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TRANSMITTAL FORM <i>(to be used for all correspondence after initial filing)</i>		Application Number	09/853,568
		Filing Date	May 3, 2001
		First Named Inventor	Catherine Shoemaker
		Art Unit	6318
		Examiner Name	Monica Smith Carter
Total Number of Pages in This Submission	24	Attorney Docket Number	1960-00100

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Firm	CONLEY ROSE, P. C.
Signature	
Printed name	Jonathan Pierce
Date	March 1, 2005
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FEE TRANSMITTAL
For FY 2005**Complete if Known**☒ Applicant claims small entity status. See 37 CFR 1.27**TOTAL AMOUNT OF PAYMENT** (\$ 250.00)

Application Number 09/853,568

Filing Date May 3, 2001

First Named Inventor Catherine Shoemaker

Examiner Name Monica Smith Carter

Art Unit 6318

Attorney Docket No. 1960-00100

METHOD OF PAYMENT (check all that apply)☐ Check ☐ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____☒ Deposit Account Deposit Account Number: **03-2769** Deposit Account Name: **Conley Rose, P.C.**

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☒ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee☒ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☒ Credit any overpayments**WARNING:** Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**FEE CALCULATION****1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

Total Claims	Extra Claims	Fee (\$)	Fee Paid (\$)
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_____ - 20 or HP = _____ x _____ = _____

HP = highest number of total claims paid for, if greater than 20

Indep. Claims	Extra Claims	Fee (\$)	Fee Paid (\$)
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_____ - 3 or HP = _____ x _____ = _____

HP = highest number of independent claims paid for, if greater than 3

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

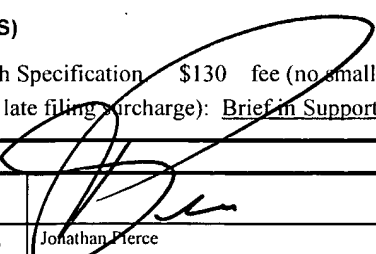
Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
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4. OTHER FEE(S)

Non-English Specification \$130 fee (no small entity discount)

Other (e.g., late filing surcharge): Brief in Support of An Appeal**Fees Paid (\$)****\$250.00****SUBMITTED BY**

Signature		Registration No. (Attorney/Agent) 42,073	Telephone (713) 238-8000
Name (Print/Type)	Jonathan Pierce	Date	March 1, 2005

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**UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

TABLE OF CONTENTS

I.	REAL PARTY IN INTEREST	3
II.	RELATED APPEALS AND INTERFERENCES	4
III.	STATUS OF CLAIMS	5
IV.	STATUS OF AMENDMENTS	6
V.	SUMMARY OF THE INVENTION	7
VI.	ISSUES.....	9
VII.	GROUPING OF CLAIMS	10
VIII.	ARGUMENTS.....	11
A.	REJECTION OF CLAIMS 22-26 UNDER § 112, ¶ 1	11
B.	REJECTION OF CLAIMS 19-26 UNDER § 103(A).....	13
1.	Rejection Based On <i>Griffiths</i>	13
2.	Rejection Based On “Printed Matter” Doctrine	15
3.	Rejection Based On <i>Griffiths</i> In View Of The “Acid-Free Printout”	17
a)	The Examiner Has Not Established That The Acid-Free Printout In Prior Art.....	17
b)	Assuming The Board Concludes That The Acid-Free Printout Is Prior Art, The Combination Of <i>Griffiths</i> And The Print Out Do Not Render The Claims Obvious.....	17
IX.	CONCLUSION.....	19
X.	APPENDIX	20

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

I. REAL PARTY IN INTEREST

The real party in interest in the instant appeal is Catherine Shoemaker, 128 Rosine,
Beaumont, TX 77707

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

II. RELATED APPEALS AND INTERFERENCES

No other appeals or interferences are known to Applicant or Applicant's legal representative that will directly affect or be directly affected by or have a bearing on the Board's decision in an appeal on this case.

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

III. STATUS OF CLAIMS

Originally filed claims:	1-12.
Added claims:	13-26.
Canceled claims:	1-18.
Presently pending claims:	19-26.
Allowed claims:	None.
Rejected claims:	19-26.
Claims objected to:	None.
Claims appealed:	19-26.

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

IV. STATUS OF AMENDMENTS

No amendments are pending.

V. SUMMARY OF THE INVENTION

The comments below apply only to those claims that specifically recite the described features. Not all of the comments below apply to every appealed claim.

The invention relates generally to pictorial or graphical labels for use on prescription medicine containers. More specifically, the invention relates to pictorial labels that alone identify the prescription medicine or to labels that contain only a non-textual, descriptive graphic, *i.e.*, the label does not contain a textual description of the prescription medicine. In the case of a prescription medicine or pill bottles, typically a label is affixed to the outer, cylindrical portion of the bottle to thoroughly describe the contents, dosage, and any special precautions for the content's use. This label usually includes pertinent information such as the name of the prescription medicine, the prescribing doctor's name and phone number, the dispensing pharmacy's phone number, the prescribed dosage amount and interval, and special restrictions.

Unfortunately, the label is often too small or too cryptic for elderly or vision impaired patients to comprehend properly. Moreover, text located on the label is often small and usually includes medical terms or scientific names of medication that the average patient does not easily understand. The matter of simply enlarging the text of the label is not always a possible solution, as space on the medicine bottle is finite. One solution to this problem has been to magnify the labels using an external source.

Because a majority of the information on the label is required by law, it is unlikely that any of the information may be removed to allow for the enlargement of any remaining text or labels. Elderly and vision impaired patients need a system and method of identifying their prescription

medications accurately, easily, and quickly. A system capable of accomplishing these tasks in an improved amount of time and with a high degree of certainty is desirable.

To add to the confusion, prescription medications have long technical names that are hard to read – much less pronounce. If one has poor eyesight, cannot read, or does not have a very good memory, it makes taking medication difficult and dangerous. There is a chance of taking the wrong medication.

Applicant's invention helps alleviate these concerns by placing pictorial or graphical labels on the outside of prescription medicine containers, so that when the patients look at these containers they will know why the medication has been prescribed. For instance, a picture or graphic of a knee with an arrow pointing to the knee informs the patient that the medication is for the pain in their knee. The very same pain medication might be given to another patient for pain in their elbow. In such case, the label would comprise a picture of an elbow with an arrow pointing to the elbow. Again, looking at the pictures or graphic will inform patients what the medication treats, without them having to remember long, technical names. Applicant's invention thus allows patients or caregivers themselves to choose which labels will help them remember the medicines. These pictorial or graphical labels can be made for any health problem concerning the human anatomy. These labels will not only help the patient, but also they will help family and other caregivers know why the medicine has been prescribed.

VI. ISSUES

Are claims 22-26 properly rejected under 35 U.S.C. § 112, ¶ 1, as failing to comply with the written description requirement?

Does the www.walgreens.com “Acid-Free Printout,” which is part of the Examiner’s rejections under 35 U.S.C. § 103(a), constitute prior art?

Are claims 19-26 properly rejected under 35 U.S.C. § 103(a) based on *Griffiths* (U.S. Patent No. 5,435,600)?

Are claims 19-26 properly rejected under 35 U.S.C. § 103(a) based on the “printed matter” doctrine?

Are claims 19-26 properly rejected under 35 U.S.C. § 103(a) as being unpatentable over *Griffiths* (U.S. Patent No. 5,435,600) in view of www.walgreens.com (Walgreens – “Acid Free Printout”)?

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

VII. GROUPING OF CLAIMS

With respect to the § 112, ¶ 1, rejection, claims 22-26 stand or fall together. With respect to the §103(a) rejection, claims 19-26 stand or fall alone.

VIII. ARGUMENTS

A. REJECTION OF CLAIMS 22-26 UNDER § 112, ¶ 1

The Examiner rejects claims 22-26 under 35 U.S.C. § 112, ¶ 1 as lacking written description support. Specifically, the Examiner argues that the written description fails to show a label having a side that has a non-textual descriptive graphic *only*. The Examiner's argument fails.

Under § 112, ¶ 1, an applicant must convey to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997). "The invention is, for purposes of the 'written description' inquiry, *whatever is now claimed*." (emphasis in original). *Id.* "[A]n applicant complies with the written description requirement . . . by using 'such descriptive means as words, structures, figures, diagrams, formulas, etc. that set forth the claimed invention.'" *Regents of Univ. of California v. Eli Lilly & Co.*, 119 F.3d 1559, 1566 (Fed. Cir. 1997).

In the present case, Applicant unquestionably conveyed to those of ordinary skill in the art, as of the filing date, that she was in possession of a label having only a non-textual descriptive graphic. As the specification makes clear, for example:

- "One embodiment of the present helps alleviate these concerns by placing *graphical icons* on the outside of the medicine containers, so that when the patients look at these containers he or she will know why the medication has been prescribed. For instance, *a picture of a knee* with an arrow pointing to the knee lets the patient know the medication is for the pain in their knee."
- "[T]he icon would comprise a picture of an elbow with an arrow pointing to the

elbow. Again, looking down at *the pictures* will greatly help those patients to know what it is for, without having to remember long, technical names.”

- “The deficiencies of the prior art may be overcome through the use of a medicine receptacle labeling system and method that includes the placement of an iconic label upon the receptacle exterior. Such *an iconic label would graphically assist* the patient in taking the proper medication by including a descriptive icon to graphically depict either the symptoms and/or desired result for which the medicine contained therein is to be taken.”
- One embodiment of iconic label 30 includes a printable media 32 upon which *a graphical icon 34* is printed or otherwise represented. . . . Graphical icon 34 upon iconic label 30 is selected to be indicative of either the medicine contained within receptacle 20 or its intended use. Icon 34 may be selected from *a wide assortment of graphical depictions* that indicate the contents of receptacle 20”

As these passages make clear, the label is a pictorial or graphical label, not a textual label. The written description requirement does not mandate that an applicant specifically state everything that its invention is not, as the Examiner’s rejection suggests. In particular, the Examiner would require the Applicant to state that the label must not include text, but rather can only be graphical. The above passages and Figure 3 in the application teach and suggest embodiments of the invention with pictorial or graphic only labels. These examples make abundantly clear to one of ordinary skill in the art that Applicant had possession of a label having only a non-textual, descriptive graphic. Accordingly, Applicant respectfully suggests that the

Examiner's rejection of claims 22-26 based on § 112, ¶ 1 be overruled.

B. REJECTION OF CLAIMS 19-26 UNDER § 103(A)

1. Rejection Based On *Griffiths*

The Examiner argues that *Griffiths* discloses a device for describing a prescription medicine contained in a prescription medicine receptacle (40) comprising a label (10) that is capable of being mounted to the receptacle having pre-printed indicia and handwritten indicia. The Examiner argues that this would *inherently* include a label having a picture that alone identifies the prescription medicine. Applicant respectfully suggests that the Examiner's rejection be overturned.

Griffiths is directed to a label that can be passed through a laser printer to have variable indicia imaged thereon, while providing carbonless image transfer. The label is also readily adapted to be applied to a container for prescription medicine. Handwritten entries may be provided on the label while initially applied to the container, which handwritten entries are transferred to other portions of the label. Then the portions of the label to which the handwriting has been transferred may be removed from the original-handwritten containing portion, so that a label is positively applied to the container, yet record information containing what is on that label is provided on a separate label, which in turn can be used for record-keeping purposes and/or applied to another substrate.

With respect to a label, *Griffiths* discusses using indicia on the label. Specifically, *Griffiths* states that the "pre-printed indicia may include a line and associated alpha numeric indicia for a doctor's name, a line and associated alpha numeric indicia for a patient's name, and a line and

associated alpha numeric indicia for a date.” Col. 2, l. 66 - col. 3, l. 3. *Griffiths* also discloses using handwritten indicia “compris[ing] the doctor’s name 42, patient’s name 43, and date 44. Of course other indicia could be provided, such as a particular species or dosage of the prescription medicine within the container 40” Col. 5, ll. 56-59.

Griffiths does not disclose or suggest the indicia being a picture that alone identifies the prescription medicine (claim 19), a picture depicting why the medicine is being used (claim 20), a picture depicting a body part (claim 21), a non-textual, descriptive graphic conveying the type of prescription medicine within the prescription medicine container (claim 22), a graphic depicting symptoms (claim 23), a graphic depicting why the medicine is taken (claim 24), a graphic depicting the ailment (claim 25), or a graphic depicting the results of consumption (claim 26).

Although *Griffiths* discusses indicia in general, that does not mean that the label of *Griffiths* inherently includes an indicia having the pictures or non-textual graphics recited in claims 19-26, respectively. In fact, the only particular indicia disclosed in *Griffiths* are textual indicia such as alpha numeric indicia for a doctor’s name, a line and associated alpha numeric indicia for a patient’s name, and a line and associated alpha numeric indicia for a date. Therefore, Applicant respectfully suggests that *Griffiths* does not inherently include the labels of claims 19 and 22 and pictures or graphic recited in claims 19-26, respectively. The Examiner’s rejection is not well founded and should be withdrawn.

Under the Examiner’s standard, after *Griffiths*, it is impossible to patent any type of label for a medicine container based on the printed matter on the label. For example, under the Examiner’s rationale, bar code information on a label would not be a basis for patentability, even if

the bar code information was itself novel and non-obvious. This is not the standard for patentability. Applying the correct standard, Applicant respectfully suggests that the Examiner's rejection is unsound and must be overturned.

2. Rejection Based On "Printed Matter" Doctrine

With respect to the rejection of claims 19-26, the Examiner argues that the printed matter doctrine supports her rejection, citing *In Re Gulack*, 217 U.S.P.Q. 401 (Fed. Cir. 1983). Applicant respectfully suggests that *Gulack* does not support the rejection of Applicant's claims. Importantly, *Gulack* establishes that "[d]ifferences between an invention and the prior art cited against it cannot be ignored merely because those differences reside in the content of the printed matter." *Id.* at 403. In fact, the Federal Circuit has more recently emphasized this point by concluding that "[t]he PTO may not disregard claim limitations comprised of printed matter." *In Re Lowery*, 32 F.3d 1579, 1583 (Fed. Cir. 1994). The Examiner's rejection ignores these clear teachings.

Moreover, *Gulack* establishes that all of the limitations of the claims, including the printed matter limitations, should be considered in determining whether the invention would have been obvious. *Id.* at n.8. As the *Gulack* court noted, the "printed matter may well constitute structural limitations upon which patentability can be predicated." *Id.*

In fact, this has long been the law. For example, in *In Re Miller*, 164 U.S.P.Q. 46 (CCPA 1969), the applicant claimed a device that was capable of measuring out multiple or fractional cooking recipes. The claimed invention comprised a receptacle, indicia on the receptacle that measured the quantity of ingredient placed in the receptacle, and a legend that informed the user

the multiple or fractional amount of the recipe being made, i.e., “1/3 recipe.” The examiner rejected the claims, arguing that the claims defined over the “ordinary measuring vessel only by the addition of unpatentable printed matter.” *Id.* at 48. In *Miller*, the prior art and the applied-for claims had the same substrate, namely measuring devices such as measuring cups or spoons. Additionally, in the prior art as well as in the applied-for claims, the printed matter was placed on the substrate. Accordingly, the patentable difference between the prior art and the applied-for claims *was the content of the printed matter*. The CCPA recognized this when it overturned the examiner’s rejection and allowed the applied-for claims:

It seems to us that what is significant here is not structural but *functional* relation

* * *

The fact that the printed matter *by itself* is not patentable subject matter, because non-statutory, *is no reason for ignoring it when the claim is directed to a combination*. Here there is a new and unobvious functional relationship between the measuring *receptacle*, volumetric *indicia* thereon indicating volume in a certain ratio to actual volume, and a *legend* indicating the ratio, and in our judgment the appealed claims properly define this relationship.

Id. at 48 and 49 (emphasis in original).

Gulack confirms the principles set forth in *Miller*:

What is required is the existence of differences between the appealed claims and the prior art sufficient to establish patentability. The bare presence or absence of a specific functional relationship, without further analysis, is not dispositive of obviousness. Rather, the critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate.

In re Gulack, 217 U.S.P.Q. at 404.

As explained above, a new and unobvious functional relationship exists in Applicant’s

claims. Applicant's invention performs a new function by having a pictorial label that alone identifies the medicine or a non-textual descriptive graphic that conveys the type of medicine. The pictorial or descriptive graphic representation of claims 19-26 *themselves* immediately conveys to the patient or caregiver the medicine in the container, why the medicine is being used, the body part being treated, the symptoms treated, the ailment, or the results of consumption of the medicine. Therefore, Applicant respectfully suggests that the Examiner's reliance on *Gulack* is improper and requests that the rejection be overturned.

3. Rejection Based On *Griffiths* In View Of The "Acid-Free Printout"

Examiner rejects claims 19-26 under § 103(a) as being unpatentable over *Griffiths* in view of the Acid-Free Printout from www.walgreens.com.

a) The Examiner Has Not Established That The Acid-Free Printout Is Prior Art

Initially, there is no evidence that the Acid-Free Printout is prior art under 35 U.S.C. § 102. Although some portions of the copy of the Printout provided to Applicant are difficult to read, as best Applicant can tell there is no evidence that supports the Acid-Free Printout being prior art. Thus, Applicant respectfully suggests that all of the Examiner's rejections based on the Acid-Free Printout should be overturned.

b) Assuming The Board Concludes That The Acid-Free Printout Is Prior Art, The Combination Of *Griffiths* And The Print Out Do Not Render The Claims Obvious

Assuming that the Board concludes that the Acid-Free Printout is prior art, the Examiner argues that the Printout discloses a label having a picture that alone identifies the medicine, such that it would have been obvious to one having ordinary skill in the art to modify the label of

Griffiths to include a picture that alone identifies a prescription medicine. As admitted by the Examiner, the Acid-Free Printout addresses over the counter (OTC) medicine, whereas claims 19-26 address prescription medicine labels. Additionally, the Acid Free Printout has a picture and a textual description of the medicine.

To establish a *prima facie* case of obviousness, the Examiner must meet the following three elements: 1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine the teachings; 2) there must be a reasonable expectation of success; and 3) the prior art reference(s) must teach or suggest all the claim limitations. *MPEP* § 2143 (2000) (citing *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991)). In the present case, the Examiner has not indicated any suggestion or motivation to combine the references. Further, even assuming that combining *Griffiths* and Acid Free is proper, the combination does not teach all of the limitations of claims 19-22, respectively.

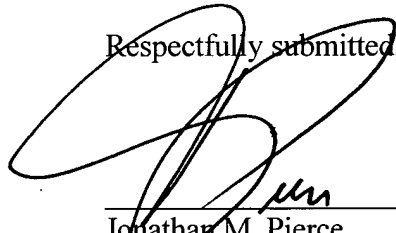
Specifically, neither *Griffiths* nor Acid Free discloses or suggests the indicia being a picture or graphic that *alone identifies a prescription* medicine. Rather, *Griffiths* does not use any picture or graphic and the Acid Free Printout uses a picture or graphic *in combination with text describing the medicine*. Thus, even the Examiner's combination fails to teach or suggest all limitations of claims 19, 20, 21, 22, 23, 24, 25, and 26. Therefore, Applicant respectfully suggests that the Examiner's rejection is improper and must be overturned.

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

IX. CONCLUSION

Applicant respectfully requests that the Board overturn the Examiner's rejections and that the claims be allowed. If any fees are inadvertently omitted or if any additional fees are required or have been overpaid, please appropriately charge or credit those fees to Conley Rose, P.C. Deposit Account Number 03-2769.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'JP', is written over a horizontal line.

Jonathan M. Pierce
Reg. No. 42,073
Conley Rose, P.C.
P. O. Box 3267
Houston, Texas 77253-3267
(713) 238-8000
ATTORNEY FOR APPLICANT

X. APPENDIX

Listing of Claims:

1. 1-18. (Cancelled)

19. (Previously Presented) A device for describing prescription medicine contained in a prescription medicine receptacle, comprising:

a label having a picture that alone identifies said prescription medicine, said label being capable of mounting to said prescription medicine receptacle.

20. (Previously Presented) The device of claim 19, wherein said picture depicts why the prescription medicine is being used.

21. (Previously Presented) The device of claim 20, wherein said picture depicts the body part for which the prescription medicine is being used.

22. (Previously Presented) A label for marking a prescription medicine container, comprising:

a first side having an adhering surface capable of adhering to said prescription medicine container; and

a second side having only a non-textual, descriptive graphic that conveys the type of prescription medicine within said prescription medical container.

23. (Previously Presented) The icon of claim 22, wherein said non-textual, descriptive graphic depicts the symptoms which the medicine is used to treat.

24. (Previously Presented) The icon of claim 22, wherein said non-textual, descriptive graphic depicts the reason why the medicine is taken.

Application Serial No. 09/853,568
Appeal Brief Dated March 1, 2005
Appeal from Final Office Action of September 13, 2004

25. (Previously Presented) The icon of claim 22, wherein said non-textual, descriptive graphic depicts the aliment that the medicine treats.

26. (Previously Presented) The icon of claim 22, wherein said non-textual, descriptive graphic depicts the results of consumption of the medicine.

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